

1802351 (Migration) [2021] AATA 2462 (21 April 2021)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1802351
MEMBER:	Michael Cooke
DATE:	21 April 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 21 April 2021 at 9:08am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) applicant did not meet the definition of spouse – applicant was no longer in a spousal relationship with the sponsor– had a child with another person – relationship was not exclusive – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, r 1.15, Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

Singh v MIBP [2014] FCCA 1403

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 January 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 24 September 2012 based on his relationship with his sponsor (Ms [A]). At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the applicant did not meet the definition of spouse in s.5F of the Act.
5. The Tribunal issued an Invitation to Provide Information pursuant to s.359(2) of the Act on 14 December 2020 as follows:

6. INVITATION TO PROVIDE INFORMATION – [applicant's name]

7. I am writing on instruction from the Member conducting your review, in relation to the application for review made by you in respect of a decision to refuse to grant a Partner (Residence) (Class BS) visa.

8. You are invited to provide the following information in writing:

- An update on the status of the criminal matter associated with the charges of March 2018 in relation to supply of a prohibited drug.

9. The information should be received by 29 December 2020. If the information is in a language other than English, it must be accompanied by an English translation from an accredited translator.

10. If you cannot provide the information by 29 December 2020, you may ask us for an extension of time in which to provide the information. If you make such a request, it must be received by us by 29 December 2020 and you must state the reason why the extension of time is required.

11. We will carefully consider any request for an extension of time and will advise whether or not the extension has been granted.

12. If we do not receive the information within the period allowed or as extended, we may make a decision on the review without taking any further action to obtain the information. You will also lose any entitlement you might otherwise have had under the Migration Act 1958 to appear before us to give evidence and present arguments.

13. On 18 December 2020 the Tribunal received a request for an extension of time to provide the information and agreed to grant an extension of time until 27 January 2021.
14. On 10 January 2021 the following email was received by the Tribunal in response:

15. I act for the above client.

16. I am requesting the tribunal to delay making a decision with this matter as the applicant is in the process of making an application to the minister. I believe an application to the minister will be made by July 2021.

17. Thanks

18. [Lawyer's name]

19. Lawyer

20. The Tribunal is required to make decisions which are "fair, just, economical and quick". The Tribunal has considered the request to delay deciding the case but, in view of the totality of the evidence before it, does not accede to the request for delay.
21. Furthermore, the Tribunal does not consider that the representative's email, nor their extension request, would be considered a response. Given that the s 359(2) request specifically requested information regarding the applicant's criminal proceedings neither email provides the information requested. The response needed to give the information that was sought: *Singh v MIBP* [2014] FCCA 1403. It does not appear to contain any of the information requested by the s 359(2) request, that being, information on the status of the criminal matter associated with supply of a prohibited drug.
22. The consequence of this is that the applicant has lost his entitlement to a hearing and the Tribunal will now decide the review without taking further action.
23. A further s.359A Invitation was sent to the applicant's authorised recipient and also to his indicated postal address on 17 February 2021 as follows:

**24. INVITATION TO COMMENT ON OR RESPOND TO INFORMATION –
[applicant's name]**

25. I am writing on instruction from the Member conducting your review, in relation to the application for review made by you in respect of a decision to refuse to grant a Partner (Residence) (Class BS) visa.

26. In conducting the review, we are required by the Migration Act 1958 to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

27. Please note, however, that we have not made up our mind about the information.

28. The particulars of the information are:

- On 30 April 2019 the cancellation of your Bridging A visa was affirmed by the Tribunal (differently constituted) (AAT1817176). Information found in the Tribunal decision record has confirmed that your relationship with your sponsor has ended.
- You also confirmed to the Tribunal (differently constituted) that you were in a spousal or de facto relationship with another woman (Ms [B]) since 2013 and that you are the father of her son, who was born on [date].

- The Tribunal (separately constituted) found that the evidence regarding your relationship with [Ms B] indicates that you have not been in an exclusive relationship with [Ms A] (your sponsor) for some time, if at all.

29. This information is relevant to the review because Clause 801.221(c) of Schedule 2 to the Regulations requires that you are, at time of decision, the spouse or de facto partner of the sponsoring partner. The definition of spouse is given in section 5F of the Act and the definition of de facto partner is given in section 5CB of the Act.

30. If we rely on this information in making our decision, we may find that you do not meet the requirements of Clause 801.221 of the Regulations and the decision under review may be affirmed

31. You are invited to give comments on or respond to the above information in writing.

32. The applicant has made no response to the Invitation pursuant to s.359A of the Act.

33. The applicant was represented in relation to the review by his registered migration agent.

34. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

CONSIDERATION OF CLAIMS AND EVIDENCE

35. The issue in the present case is whether the applicant can meet the definition of spouse in s.5F of the Act at time of decision.

SPOUSE/DEFACTO (cl.801.221(2))

Whether the parties are in a spouse or de facto relationship

36. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
37. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

38. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

39. Findings and reasons about each matter in r.1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under r.1.15A(2):

- Financial aspects of the relationship - including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
40. The Tribunal notes the applicant made a statutory declaration to the Department dated 18 December 2015 wherein he stated that he has separate and joint bank accounts with his sponsor. He stated that his sponsor contributed her half of the rent out of her separate account, and that she paid for the food and her son's expenses, while he paid the electricity and internet bills. To support these claims, he provided their joint [bank] account statements and his individual [bank] account statements.
41. The Tribunal has received information provided by the applicant's (at that time) representative in which he indicates that in early 2018 the parties had financial aspects of the relationship which appeared to be spousal in nature. This was indicated by joint ownership of a car and utilities expenses in both names.
42. However, the Department had received reliable information that the applicant been in a spousal or de facto relationship with another woman (Ms [B]) since 2013 and that he was the father of her son, who was born on [date]. The applicant has confirmed this information to the Tribunal (separately constituted) in his oral evidence (AAT1817176).
43. The Tribunal notes that the spouse relationship between the sponsor and the applicant has subsequently ended according to information presented to the Tribunal (separately constituted) in 2019 and is contained in the Tribunal decision record of the review of the cancellation of his Bridging A visa which was affirmed on 30 April 2019 (AAT1817176).
44. The Tribunal finds that the financial aspects of the relationship do not indicate a spousal relationship.
- Nature of the household - including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
45. The Tribunal has seen the evidence gathered by the delegate and entered into his decision record (submitted to the Tribunal). This evidence discloses that the applicant issued a statutory declaration in which he stated that he resides with his sponsor and her child, [Child 1], at [address deleted], New South Wales. This information conflicted with Department of Human Services records which stated that his sponsor had been in receipt of a family tax benefit since 30 November 2011. Furthermore, it disclosed she resided at a separate address to him and that she has declared herself as a single person in her regards to her personal status. In response to this information, the applicant's sponsor has stated that she forgot to inform Centrelink of her change of address and marital status and that she believed she only needed to do so if she had lost her job. The applicant provided photographic evidence in 2018 of himself in father-like behaviour with [Child 1] – his sponsor. Another

family friend issued a testimonial insisting there was a spouse-like household. Other indicia of a household were also submitted indicating joint tenancy of a dwelling.

46. However, the Department in additional information disclosed (see delegate's decision record on the Tribunal file) that the applicant had been residing with a Ms [B] since 2013. This was prior to him being granted his Subclass 820 visa. The delegate's information further disclosed that Ms [B] gave birth to a [son] in [year]. During his interview with the Department in May 2017, the applicant denied being in a relationship with Ms [B]. He stated that he had met Ms [B] after he had a car accident which had resulted in his sponsor kicking him out of the house. He stated that he met Ms [B] at a [venue] and after a 'one-night stand' Ms [B] called him a few weeks later to advise him that she was pregnant.
47. However, this explanation conflicted with social media postings evidence obtained by the Department (see delegate's decision record) showing the applicant holidaying with Ms [B] [in another state] over Christmas 2015 and spending Christmas 2016 together. Furthermore, it appears from the evidence that Ms [B] had made several social media posts in which she referred to the applicant as her husband or partner.
48. The Tribunal notes that the spouse relationship between the sponsor and the applicant has subsequently ended according to information presented to the Tribunal (separately constituted) (AAT1817176). As the s.359A information reveals the applicant conceded he was in a de facto relationship with Ms [B].
49. The Tribunal finds that the nature of the parties' household is that it is not a spousal one.
 - Social aspects of the relationship - including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
50. In the applicant's statutory declarations made in December 2015, he and his sponsor stated that they socialise with friends at parties most Saturday nights, and that the applicant would be taking his sponsor [overseas] on [date] February 2016. Subsequently, the delegate revealed (in the decision record) that the sponsor had not left Australia since her arrival in Australia. According to Departmental records, the applicant travelled overseas alone in October 2014 and April 2015. The parties both stated that they continued to reside together with his sponsor's son at [a specified] address and that nobody else resided with them. The applicant insisted that everyone in his community was aware of his relationship with his sponsor. The information given by the applicant and sponsor, however, has not been supported by social media which indicated that he was in a relationship with Ms [B].
51. There was some photographic evidence submitted in 2018 to contradict the delegate's claims that the applicant has not had a social relationship with the sponsor. However, the spouse relationship between the sponsor and the applicant has subsequently ended according to information presented to the Tribunal (separately constituted) (AAT1817176) and put to the applicant (without response) in the s.359A Invitation.
52. The Tribunal finds that the any purported social aspects of the parties' relationship have ended with the demise of the claimed spouse relationship. Their social relationship is not a spousal one.
 - Nature of persons' commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

53. In a Statutory Declaration made on 18 December 2015, the applicant stated that he and his sponsor are very compatible. He said this was because they come from the same country. They both understand each other and like the same food. The applicant's sponsor stated in her declaration that he loves her son and that she believes his relationship with her is a long-term one. However, it should be noted that both these Statutory Declarations were signed in December 2015 at which time the evidence before the Tribunal indicates the applicant had been in an on-going relationship with Ms [B] for two years. The applicant also confirmed to the Tribunal (differently constituted) that he was in a de facto relationship with another woman (Ms [B]) since 2013 and that he is the father of her son, who was born on [date].
54. The Tribunal finds (from the cumulative evidence before it) that the any claimed spouse relationship between the sponsor and the applicant in all probability never occurred according to information presented by the applicant to the Tribunal (separately constituted) and put to him for comment pursuant to s.359A of the Act. The applicant has informed the Tribunal (separately constituted) that he has been in a long-term relationship with Ms [B] and had a son with her.
55. The Tribunal finds that the nature of the persons' commitment to each other (despite the length of the claimed relationship) was that it never existed and was never spousal in nature. There is no evidence of any companionship and emotional support which the parties draw from each other. The evidence from the s.359A Invitation indicates that they do not see their relationship as long-term.
- Any other circumstances of the relationship.
56. The circumstances surrounding the applicant's criminal matters have not been revealed to the Tribunal despite a request to do so.
57. The Tribunal has considered 'the full circumstances of the relationship' and makes the following findings on these matters against s.5F(2)(b)-(d) of the Act. The parties do not have a mutual commitment to a shared life to the exclusion of others and a genuine and continuing relationship. They do not live together and live separately and apart on a permanent basis.
58. Given these findings the Tribunal **is not** satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant **does not meet** cl.801.221(2)(c).
59. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221(2A), (3), (4), (5) or (6).
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).